78-122

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

JULY TERM, A.D. 1978

MICHAEL SHULER Petitioner,

vs.

STATE OF INDIANA Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Dean E. Richards,
156 E. Market 7th Floor
Indianapolis, Indiana
Counsel for Petitioner

Theodore L. Sendak
Attorney General of Indiana
Indianapolis, Indiana
Attorney for Respondent

INDEX

Page

The Opinion Below.....2

Statement of the Jurisdiction.....2

Questions Presented.....2

Constitutional Provisions Involved...3

Statement of the Case.....3

Reasons for Granting Writ.....4

Conclusion.....23

APPENDIX A

December 14, 1977 decision.....

APPENDIX B

Petition to Transfer to The Supreme Court denied.....

AUTHORITIES CITED

Wyatt v. State, 243 S.C. 133 S.E. 2d 120 376 US 925 84 S Ct 686.....5

United States v. Jackson (1967), 390 US 570, 88 S Ct 1209, 20 L. Ed 2d 138.....12

North Carolina v. Pearce (1969), 395 US 711, 89 S Ct 2072.....13

Griffin v. California, 380 US 609, 85 S Ct 1229, 14 L. Ed. 2d, 106....14

Johnson v. Avery, 393 US 483, 89 S Ct 747, 21 L. Ed. 2d 718.....14

Miranda v. Arizona (1966) 384 US 436, 86 S Ct 1602, 16 L. Ed. 2d....15

Page

Frank v. Nangum 237 US 309 35 S Ct 582.....22

Rochin v. California 342 US 165 72 S Ct 205.....22

RULINGS CITED

Indiana Rules of Criminal Practice TR 17.....23

IN THE

SUPREME COURT OF THE UNITED STATES

JULY TERM, A.D. 1978

MICHAEL SHULER

Petitioner,

vs.

STATE OF INDIANA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of Indiana which affirmed the decision of the Court of Appeals of Indiana, the Petition For Transfer was denied on June 21, 1978, and decision of the Court of Appeals of Indiana was dated December 14, 1977, which resulted in affirming a Trial Court's verdict of guilty against the Petitioner for assault and battery.

THE OPINION BELOW

The final opinion of the Supreme Court of Indiana which denied Petitioner's Application for Transfer was dated June 21, 1978, and the decision of the Court of Appeals of Indiana upon which the Petition was based is dated December 14, 1977, under Cause No. 2-975-A-241.

STATEMENT OF JURISDICTION

The denial of the Petition For Transfer to the Supreme Court of Indiana from the Court of Appeals of Indiana took place on June 21, 1978. The statutory provision believed to confer jurisdiction upon this Court is Title 28, United States Code, Section 1257.

QUESTIONS PRESENTED

1. Whether Defendant's rights were violated because of ineffective assistance of counsel where evidence was presented at the trial without objection by Petitioner's counsel and said evidence was all illegally obtained by the State of Indiana. The evidence consisted of the following:

(a) Confession by Defendant without police reading his constitutional rights.

(b) Police line up.

(c) Search of Defendant's automobile without a warrant.

(d) Extrajudicial statements of Defendant by police officer.

That further, no defense of self-defense was presented at the trial even though such defense was clearly warranted in this case. Further, no objection to the illegal sentencing procedure was made wherein Defendant was to receive a suspended sentence with ten (10) weekends in jail in lieu of an executed sentence if the Defendant waived his right of appeal.

2. Whether Defendant-Petitioner's rights were violated due to the Court failing to set aside the jury verdict because Defendant would not waive his right of appeal.

3. Whether Defendant's rights were violated because the Trial Court refused to hear or rule on Petitioner's Motion For New Trial based upon newly discovered evidence as provided for in the Indiana Rules of Criminal Procedure.

CONSTITUTIONAL PROVISIONS INVOLVED

What denial of Petitioner's constitutional right to assistance of counsel violated the due process provision of the Constitution of the United States?

STATEMENT OF THE CASE

The Petitioner was convicted of assault and battery of another motorists along an

interstate highway in Indianapolis, Indiana. That the Petitioner and another motorist stopped their car along an interstate highway at night and three (3) men including the victim emerged from their car and the Petitioner walked from his car and the motorist was allegedly shot in the neck by the Petitioner. The parties did not know each other previous to the shooting. The Petitioner then immediately left the scene and was later arrested by employees from the victim obtaining the license number of his automobile. That later Petitioner was arrested and tried and found guilty of assault and battery and given six (6) months in jail and a Thousand Dollar ($1,000.00) fine after a jury trial. At sentencing the Judge sentenced the Petitioner to six (6) months in prison without imposing said One Thousand Dollar ($1,000.00) fine. That the Petitioner filed a timely appeal before the Indiana Court of Appeals and said verdict was affirmed. That Petitioner then petitioned to transfer the case to the Supreme Court of Indiana and said Petition For Transfer was denied. That Petitioner now seeks a Writ of Certiorari before this Honorable Court.

REASONS FOR GRANTING WRIT

Where life and liberty are involved due process requires that there must be a regular course of judicial proceedings. It requires that a criminal trial must

proceed according to the established procedure or rules of practical applicability to all such cases. And that the due process provision of the Fourteenth Amendment was intended to guarantee certain procedural standards adequate and appropriate to protect at all times persons charged with or suspected of crime by persons holding positions of power and authority. Petitioner is aware that a Defendant in a criminal proceedings may not generally base the denial of his right to due process of law on errors committed during the course of the trial by a paid attorney of his own choice. But where counsel's representations of the Defendant is so lacking in diligence and competence as to reduce the trial to a farce and a mockery of justice the judgment will be declared void as an invasion of the Defendant's constitutional right to the assistance of counsel. Wyatt v. State, 243 S.C. 133 S.E. 2d 120 376 US 925 84 S Ct 686. In the present case the investigating police officer questioned the Petitioner concerning the incident along the interstate highway and the investigator stated in his opinion that the Petitioner had received the "Miranda Advisement". The Petitioner argues that the mere statement of such a conclusion cannot suffice to show that the Petitioner had been advised of all of his constitutional rights before answering questions to the police officer. Nevertheless, the Petitioner's confession

went into evidence without objection from counsel nor was the investigating officer questioned surrounding the waiving of the Defendant's rights or the circumstances in which the confession was obtained. That further, the Petitioner was placed in a police line up without the presence of counsel and without being advised of any of his rights by any of the officers involved in the line up and the Petitioner was the only person in the line up for the witnesses to recognize. This evidence was introduced at the trial without objection by defense counsel nor was the issue of the police line up ever raised by counsel of record. That further, a search was made of the Defendant's automobile without a warrant and without permission of the Petitioner and said evidence was testified to at trial without objection by counsel nor did counsel interrogate or in any way question the circumstances of how the police officers obtained said evidence. That further, inadmissible extrajudicial statements were admitted into evidence that were allegedly made by the Petitioner that were hearsay and very prejudicial to the Petitioner, such as his whereabouts before the shooting incident occurred and what the Petitioner did after the shooting incident occurred. These statements were made by witnesses and the investigating officers without objection by defense counsel. Without the admission of the above stated illegal evidence the prosecution's case would have fell for

a total lack of proof.

That further, the Petitioner-Defendant testified concerning the incident but was not advised by counsel of the defense of self-defense and was not questioned by defense counsel whereas the Plaintiff could put the defense into issue. Such a defense is recognized under Indiana law. That further, when the Petitioner was sentenced by the Judge Pro Tem his defense lawyer did not question the sentencing procedure even though the Judge was willing to set aside the jury verdict if the Petitioner would waive his right of appeal. That in fact, the fine was modified by the Trial Court from the sum of One Thousand Dollars ($1,000.00) to zero.

That in further argument for granting said Writ of Certiorari the Petitioner argues that the sentence of the Petitioner was unlawful because the record affirmatively showed that the Trial Court rendered and executed sentence only because the Defendant-Petitioner refused to waive his right of appeal. At the sentencing of the Petitioner the following colloquy with the Court took place:

"The Court: So be that as it may, I have given some very serious consideration. Having read the presentence investigation report, I'm

going to give you a choice. As your attorney, Mr. Ward, has told you I could follow the sentence of the jury and sentence you to the Indiana State Farm for six months. Naturally, you are entitled to appeal this and I'm not suggesting that you don't. But I'm sure you've been explained your alternatives. I've also considered giving you ten weekends in the Marion County Jail from Friday at six o'clock P.M. until Monday morning at eight, with a year's probation, and there will be a condition to that probation also. Now, I'm going to let this be your decision, your choice, as to how you want to proceed with this. This would be entirely up to you---

Defendant: What--what would be conditions of probation?

The Court: That you not carry a weapon for one year. So you can learn good judgment and how to use a weapon, as far as I'm concerned. This is your choice, because I realize the uniqueness of the situation. Normally, under other circumstances, I would go ahead and execute judgment according to the jury, because there are twelve good citizens of this community who heard this case and rendered a verdict accordingly. Now, as far as I'm concerned it's up to you, Mr. Schuler.

Defendant: Well, from a legal standpoint, right's right, and wrong's wrong, and from a moral standpoint right's right and wrong's wrong, and so far as I'm concerned there is no concerned. I---I--- I can't accept -- I can't accept something and feel in my heart that morally that it's not right, and I can appreciate your --- on behalf of my business and my family -- offering the ten weekends in jail, but again, I can't accept it and not---and not have the right of appeal, because I---

The Court: That's very fine, and believe me, I'm not trying to talk you out of this situation---

Defendant: No, I know you're not.

The Court: ---I'm just presenting an alternative from my standpoint, so-- All right. I hereby sentence you to the Indiana State Farm for a period of six months."

(Tr. pp. 175-178)

On the matter of the Petitioner's being required to choose between probation and having an appeal this, admittedly is not clearly stated by the Court when the question is first put to the Petitioner in the above-quoted proceedings. At first the Court merely states that the Petitioner is being given a choice and that the Court assumes that

the Petitioner has discussed the matter at length with his attorney. The record, however, becomes unequivocal, however, when the Petitioner states: I can't accept it and not--and not have the right of appeal, because I---" At that point it becomes completely clear and it had to be clea_ to the trial court that it was the Petitioner's understanding that he would have to agree not to appeal in accepting the trial court's offer of probation. The trial court proceeded with the colloquy without giving the Petitioner any advisement that he was incorrect in what was his clearly stated impression as to the matter. To be sure, immediately after the Petitioner's said statement as to his impression regarding the situation the trial court stated: "--believe me, I'm not trying to talk you out of this situation." and the Petitioner replied: "No, I know you're not." and the trial court immediately went on to say: "I'm just presenting an alternative from my standpoint." This in no way constituted an advisement to the Petitioner that he could have both a suspended sentence and an appeal. The trial court's statement that "I'm not trying to talk you out of this situation" was simply a statement that the trial court was not seeking to pressure the Petitioner into choosing an appeal over a suspended sentence. In the context in which it was made it can be given no other interpretation.

Lest it be urged by the State of Indiana that the choice presented the Petitioner was that of choosing between the relinquishing of his gun carrying privileges for a year or accepting a six month executed sentence it is to be noted that the trial court made the statement to the Petitioner that "I'm sure you've been explained your alternatives" in the context of the matter of appeal prior to the point where the Petitioner is informed of the additional no-gun-carrying condition. There can be no question that the Petitioner was not making a choice between ten weekends and six months imprisonment. The choice presented and made was that of deciding between an appeal and an executed sentence.

It is here asserted that the right to appeal is a Constitutional Right in addition to being a statutory right under the latest amendment to the Constitution of Indiana and that it is a federal constitutional right as well insofar as the second proposition of law presented in this brief seeks vindication of the Petitioner's rights.

It should matter not whether the attempted vindication of the Petitioner's Federal Constitutional rights under the Fifth Amendment to the United States Constitution proves or fails to prove to be well taken. The fact will remain nonetheless that the Petitioner

was required to and did reject a suspended sentence in order to seek vindication of what he believed to be his rights in the matter.

It is acknowledged that there have been traditions of long standing that developed in the United States forming a policy of judicial non-interference with trial court sentences questioned on appeal. But even at its high-point this tradition and policy, as will be shown hereinafter, had its exceptions, exceptions which would be applicable here even without the recent and very substantial break with this tradition.

The aforesaid recent developments began on a national scale with the decision in United States v. Jackson (1967), 390 US 570, 88 S Ct 1209, 20 L. Ed. 2d 138 wherein it was held that the federal kidnapping statute was unconstitutional insofar as it provided for the giving of the death penalty in cases tried by jury but had no such provision applicable to cases tried by court. The holding was that the structure of the statute provided defendants with undue incentive to waive their Constitutional right to a trial by jury and thus imposed an unconscionable penalty upon one's resorting to that right. It was not long after the Jackson decision that a similar holding was forthcoming which extended the Jackson ruling to

apply to judicial as well as legislative practice and with dicta relating to any statutory or judicial practice which might have a "chilling effect" upon the initiative of a citizen in resorting to any of his fundamental or constitutional rights. In North Carolina v. Pearce (1969), 395 US 711, 89 S Ct 2072 the judicial practice of giving a defendant a greater sentence upon retrial and reconviction after having the original conviction and sentence set aside on appeal came, for the first time, under Constitutional scrutiny and the holding was as follows:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retalitory motivation on the part of the sentencing judge.

North Carolina v. Pearce, supra at 89 S Ct 2080

The dicta in Pearce rendering the holding applicable to all judicial practices which would tend to dissuade a criminal defendant from resorting to remedies provided by the Constitution was as follows:

> And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to 'chill the exercise of basic constitutional rights.' See Griffin v. California, 380 US 609, 85 S Ct 1229, 14 L. Ed. 2d, 106; cf. Johnson v. Avery, 393 US 483, 89 S Ct 747, 21 L. Ed. 2d 718.
>
> North Carolina v. Pearce, supra at 89 S Ct 2080

Pearce did contain a cautionary note to the effect that the scope of its ruling probably would be confined to the vindication of only Constitutional rights and not mere statutory rights:

> Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment 'penalizing those who choose to exercise' constitutional rights, 'would be patently unconstitutional.' United States v. Jackson, 390 US 570, 581, 88 S Ct 1209, 20 L. Ed. 2d 138.

> North Carolina v. Pearce, supra at 89 S Ct 2080

In Miranda v. Arizona (1966) 384 US 436, 86 S Ct 1602, 16 L. Ed. 2d the United States Supreme Court was very specific as to the requirements of what would constitute a proper advisement prior to the taking of an investigatory statement from an accused under circumstances amounting to custodian interrogation, i.e. once the suspect is no longer free to leave the presence of the interrogator:

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot

afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.. (Emphasis supplied)

Miranda v. Arizona, supra at 384 US 478-479

The Supreme Court went even further in emphasizing the point that the burden rests fully on the state to demonstrate that the statement of an accused was made with full understanding of the Constitutional rights involved:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. (citing case)

> This Court has always set high standards of proof for the waiver of Constitutional rights. (citing case) and we resort to these standards as applied to in custody interrogation. Since the State is responsible for establishing the isolated circumstances under which this interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.
>
> Miranda v. Arizona, supra at 384 US 475

Nor does it matter that the Petitioner's trial counsel interposed no objection at the time of the complained-of admission. This situation too is covered by footnote 69 to the Miranda decision:

> The failure of defense counsel to object to the introduction of the confession at trial, [illegible] by the Court of Appeals [illegible] emphasized by the Solicitor General, does not preclude our consideration of the issue.

Numerous other decisions have followed the Miranda ruling but none of them add anything to the matter at issue herein. That decision was all inclusive

in anticipating the questions that would arise and it is conclusive on the proposition of law herein presented by the Petitioner.

The Petitioner's statement was in no way recorded or reduced to writing and the fact that the investigator unquestionably gave a garbled version of what the Petitioner told him can be demonstrated from the fact that it not only differed from the Petitioner's testimony in many particulars, it also differed from the account given by the State's two witnesses.

The Petitioner's statement as recited by the investigator can be broken down as follows:

(1) That the incident began when the Petitioner was driving on the interstate and a vehicle came up behind him with bright lights.

(2) The vehicle with the bright lights passed the Petitioner and then the Petitioner repassed the said vehicle and then they re-passed each other each an additional time.

(3) While in front of him the other vehicle's motion the Petitioner to pull over.

(4) The Petitioner pulled off behind the other vehicle and then went around in front of the other vehicle where he stopped.

(5) The Petitioner got out of his vehicle with a pistol in hand for protection. The driver of the other vehicle approached the Petitioner, made a lunge at him and the gun went off.

On these five points the alleged victim and the victim's friend testified as follows:

(1) The incident began when the Petitioner approached from behind the victim's car at a high rate of speed and tailgated it. (Tr. p. 83, LL. 3--6 & p. 109, LL. 1--5)

(2) The Petitioner's car twice pulled along side or somewhat in front of the victim's car with the cars switching lanes. (Tr. p. 84, LL. 1--11 & p. 109 LL. 9--19)

(3) The Petitioner was in front of or along side the victim's vehicle when he was motioned to pull over. (Tr. p. 84, LL. 9--12 & p. 109, LL. 15--19)

(4) The Petitioner pulled off in front of the other vehicle and the other vehicle pulled up close behind him. (Tr. p. 84, LL. 19--25 & p. 110, LL. 17--21)

(5) Here the officer's testimony was a very abbreviated version as compared to the other accounts.

On each of the first four points the Petitioner's testimony coincided with that of the State's eye-witnesses and contradicted the investigating officer's. (Tr. p. 151) To be sure, the Petitioner's version varied very substantially from that of the victim and his friend on those matters relevant to guilt or innocence, matters which the investigating officer's testimony barely touched upon. There was no possible reason for the Petitioner to have made a false statement to the investigator on items (1) thru (4) and it is obvious that the investigating officer's testimony came from his totally muddled recollection of the completely unrecorded and undoubtedly casual conversation he had with the Petitioner at the time of his arrest. The Petitioner testified immediately after the investigating officer and the officer's testimony could only have had the effect of making the Petitioner appear deceptive notwithstanding the fact that his testimony coincided with that of the prosecuting witnesses on every point where he

and the officer differed. No State's interest was served by the introduction of the investigator's recollection of the Petitioner's statement other than the accomplishing of a wanton attack upon the credibility of the Petitioner relating to matters of no importance. The basic purpose of Miranda decision was not the outlawing of the notorious rubber hose confessions which had long since been outlawed by other decisions. Miranda's basic purpose was the formalization of interrogation proceedings to the end that sloppy recitations of a defendant's statement be prevented for the practical reason that they are completely degrading to the trial process.

That even the commitment in this matter is bizarre and unusual in that the commitment stated that the crime was "Unlawful entry into vehicle Offenses Against Property Act" and that the defendant was ordered incarcerated for six (6) months. The verdict of the trial court found the defendant guilty of assault and battery. The Petitioner is unable to cite either case or statutory authority in support of of his assertion that a commitment must correctly state the offense for which the Petitioner has been committed but that the fact situation is so unusual and propriety of such a commitment is so obvious that the Petitioner's argument

that a wrong has been done is so much a truism that it simply goes without saying. In the case of Frank v. Nangum 237 US 309 35 S Ct 582 this Court held "Due process of law precludes defining, and thereby confining, the standards required of states in their criminal prosecutions more precisely than to say that prosecutions cannot be brought about by methods that offend 'a sense of justice'." Rochin v. California 342 US 165 72 S Ct 205.

The Petitioner filed an affidavit in his Motion To Correct Errors to the Court of Appeals of Indiana alleging that the injury testified to by the victim was misrepresented in that the prosecuting witness made statements that he had been shot in the neck when in fact medical evidence the hospital records which were not introduced at the trial showed that the victim was only nicked and the injury received was nothing like the witness presented at trial. That further, the affidavit brought out certain facts surrounding the prepared testimony of the prosecuting witness and his passengers in his car that conflicted with statements made outside of court. That the State of Indiana did not choose to file counter-affidavits or an answer to said Motion contradicting the affidavit in the Motion To Correct Errors. The Indiana Rules of

Criminal Procedure TR 17 allow said affidavits on Motion To Correct Errors. That the Petitioner has timely filed all motions in the lower courts.

CONCLUSION

Petitioner prays that a Writ of Certiorari issue and that the decision of the Supreme Court of Indiana denying Petitioner's Petition For Transfer of the criminal matter from the Court of Appeals of Indiana be granted and that the criminal matter be reviewed and remanded for further proceedings not inconsistent with an appropriate opinion.

DEAN E. RICHARDS

Attorney For Petitioner

APPENDIX A

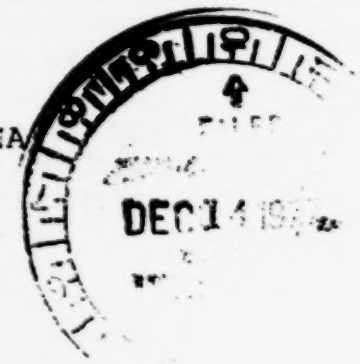
NOT FOR PUBLICATION

ATTORNEY FOR APPELLANT:	ATTORNEYS FOR APPELLEE:
DEAN E. RICHARDS RICHARDS, BENNETT and BRAVARD 707 Inland Building 156 East Market Street Indianapolis, Indiana 46204	THEODORE L. SENDAK Attorney General of Indiana ROBERT L. CLEGG, III Deputy Attorney General 219 State House Indianapolis, Indiana 46204

IN THE

COURT OF APPEALS OF INDIANA

SECOND DISTRICT



MICHAEL SCHULER, Appellant (Defendant Below), -vs- STATE OF INDIANA, Appellee (Plaintiff Below).	)	No. 2-975-A-246

APPEAL FROM THE MARION CRIMINAL COURT, DIVISION FOUR
The Honorable James A. Neel, Special Judge

BUCHANAN, J.

MEMORANDUM DECISION

Defendant-Appellant Michael Schuler (Schuler) appeals his conviction of Assault and Battery,[1] claiming his confession was improperly admitted, the trial court rendered an executed verdict because Schuler refused to waive his right to appeal, and the sentence is improper.

The facts are as follows:

On December 3, 1973, Frederick Alter (Alter) and Virgil Chesseldine (Chesseldine) were driving on I-465 in Marion County. Schuler's car followed closely and cut abruptly in front of Alter's car as it passed. After both cars stopped, the drivers emerged and Schuler drew a gun and shot Alter.

On February 5, 1974, Schuler was charged with Assault and Battery with Intent to Kill.[2] At trial, prior to the admission of Schuler's confession (to which no objection was made), the following exchange took place:

1. Ind. Code § 35-1-54-4.

2. Ind. Code § 35-13-2-1.

Prosecution: Now, on that date in question, did you have an occasion to talk with the defendant?

Officer: Yes, I did.

Prosecution: Did you advise the defendant of his constitutional rights?

Officer: Yes.

Prosecution: Are you familiar with the Miranda warning?

Officer: Yes.

Prosecution: Did you advise the defendant of the Miranda Warning?

Officer: Yes.

Prosecution: Did you indicate to him that part of his constitutional rights, he had the right to remain silent and not to make any statement at that particular time?

Officer: Yes.

At that time the police officer recounted the conversation with Schuler which substantiated that he was at the scene with a gun, but denied that he had shot anyone. Schuler was then convicted of Assault and Battery.

At the sentencing in which Schuler was present with counsel the following exchange took place:

The Court: So be that as it may, I have given some very serious consideration. Having read the pre-sentence investigation report, I'm going to give you a choice. As your attorney, Mr. Ward, has told you that I could follow the sentence of the jury and sentence you to the Indiana State Farm for six months. Naturally, you are entitled to appeal this and I'm not suggesting that you don't. But I'm sure you've been explained your alternatives. I've also considered giving you ten week-ends in the Marion County Jail from Friday at six o'clock P.M. until Monday morning at eight, with a year's probation, and there will be a condition to that probation also. Now, I'm going to let this be your decision, your choice, as to how you want to proceed with this. This would be entirely up to you - - - -

Defendant: What--what would be conditions of probation?

The Court: That you not carry a weapon for one year. So you can learn good judgment and how to use a weapon, as far as I'm concerned. This is your choice, because I realize the uniqueness of the situation. Normally, under other circumstances, I would go ahead and execute judgment according to the

jury, because there are twelve good citizens of this community who heard this case and rendered a verdict accordingly. Now, as far as I'm concerned it's up to you, Mr. Schuler.

Defendant: Well, from a legal standpoint, right's right, and wrong's wrong, and from a moral standpoint right's right and wrong's wrong, and so far as I'm concerned there is no choice I---I---I can't accept -- I can't accept something and feel in my heart that morally that it's not right, and I can appreciate your--- on behalf of my business and my family -- offering the ten weekends in jail, but again, I can't accept it and not --- and not have the right of appeal, because I---

The Court: That's very fine, and believe me, I'm not trying to talk you out of this situation---

Defendant: No, I know you're not.

The Court: ---I'm just presenting an alternative from my standpoint. So--- All right. I hereby sentence you to the Indiana State Farm for a period of six months.

Schuler raises three errors:

(1) Was there sufficient testimony that Schuler had been given his Miranda

warning before his statement could be admitted at trial?

(2) Did the trial court give Schuler a choice of a suspended sentence if he would waive his right to appeal?

(3) The commitment order says he was convicted of Offense Against Property Act although Schuler was convicted of Assault and Battery.

Schuler initially contends that it is improper to merely state that Miranda warnings were given but that each one must be enumerated at trial before a confession can be admitted.

He secondly argues that the trial judge offered to suspend his sentence if he would waive the right to appeal. Such a bargain, he says, is improper and renders the entire sentence void.

I.

It is a well settled rule of appellate practice that error may not be predicated on the admission of evidence unless there was timely and specific

objection in the trial court. Harrison v. State (1972), 258 Ind. 359, 281 N.E.2d 98; Cooper v. State (1976), ___ Ind.App. ___, ___, 357 N.E.2d 260, 263. As no such objection was raised at the time this confession was sought to be introduced, any error that might exist is waived.[3] [4]

Furthermore, the officer stated he was familiar with the Miranda warning, and it was given Schuler.

II.

The exchange between Schuler and the Court at the sentence hearing is somewhat ambiguous. Conceivably it contained a vague hint by the Judge that

---

3. Schuler argues that in Miranda v. State of Arizona (1966), 384 U.S. 436, 86 S.Ct. 1602, no objection was raised at trial by defense counsel and yet the error was preserved. However, it is clearly stated in footnote 69 that the reason the error was preserved in Miranda is because the trial was held prior to the decision in Escobedo v. State of Illinois, 373 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). That not being the situation here, the error is waived.

4. Schuler cites no cases that state the Miranda rights must be specifically enumerated at trial. See e.g., Colvin v. State (1976), ___ Ind. ___, 346 N.E.2d 737.

Schuler's sentence might be suspended if he waived his right to appeal, although, if the hint existed it was never pursued. However, it is just as reasonable to find no such hint. Apparently Schuler misunderstood the Judge's comment, but neither he or his counsel sought clarification.

Also Schuler demonstrates no harm. He rejected the only condition the trial court explicitly offered, which was to suspend his sentence if he would refrain from carrying a gun. And he did appeal. Schuler had no right to a lighter sentence and received a sentence within the limits of the law.

Finding no grounds for reversal, this decision is affirmed. However, the trial court is directed to promptly correct the commitment order and its records to reflect that Schuler was convicted of Assault and Battery, not a violation of the Offense Against Property Act. The trial court is further ordered to give Schuler credit for any jail time he is entitled to under law.

SULLIVAN, P.J. CONCURS WITH SEPARATE OPINION.
STATION, P.J. (by designation) CONCURS.

ATTORNEY FOR APPELLANT:

DEAN R. RICHARDS
Richards, Bennett & Bravard
707 Inland Building
156 East Market Street
Indianapolis, Indiana 46204

ATTORNEYS FOR APPELLEE:

THEODORE L. SENDAK
Attorney General of Indiana

ROBERT L. CLEGG, III
Deputy Attorney General

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204

IN THE

COURT OF APPEALS OF INDIANA

SECOND DISTRICT

MICHAEL SCHULER, Appellant (Defendant Below),	)	
v.	)	No. 2-975-A-246
STATE OF INDIANA, Appellee (Plaintiff Below).	)	

APPEAL FROM THE CRIMINAL COURT OF MARION COUNTY,
DIVISION FOUR.
The Honorable James A. Neel, Special Judge

SULLIVAN, P.J., CONCURRING

I concur in Part I of the majority opinion. I concur in result as to Part II.

The leniency offered defendant did not in the strict sense involve "probation". Probation is necessarily tied to a suspended sentence. State ex rel. Wilson v. Lowdermilk (1964) 245 Ind. 93, 195 N.E.2d 476. Here, the court tentatively offered a reduced sentence, to which was added an additional condition, i.e., that defendant not carry a gun for a year.

The dialogue between defendant and the court at the time of sentencing did not therefore concern a suspended sentence and a period of probation. Rather it concerned an offer of a less severe sentence, i.e., ten weekends to be served in jail. But see State v. Kuczynski (1st Dist. 1977) Ind.App., 367 N.E.2d 8.

Under the law of this state, the penalty for assault and battery under I.C. 35-1-54-4 (Burns

Code Ed. 1975) is required to be fixed by the jury. I.C. 35-8-2-1 (Burns Code Ed. 1975). The trial court is without authority to modify a sentence so determined. Limeberry v. State (1945), 223 Ind. 622, 63 N.E.2d 697. See Kelsie v. State (1976)Ind., 354 N.E.2d 219.

Therefore, the trial court here had embarked upon an improper course of action when it tentatively offered defendant a reduced sentence. For this reason the failure of defendant to have received the benefit of the unauthorized leniency cannot constitute cause for reversal.

It is for this reason that I concur in the result as to Part II.

APPENDIX B

State of Indiana Indianapolis, 46204

Clerk of the Supreme Court Telephone 633-5200
And Court of Appeals

Billie R. McCullough, Clerk
217 State House

No. 2-975A246

Michael Shuler v. State of Indiana

You are hereby notifed that the Supreme Court has on this day Appellant's Petition to Transfer DENIED. Givan, C.J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court,

This 21st day of June, 1978

/s/ Billie R. McCullough
Clerk Supreme Court and
Court of Appeals

6/21/78

No. 2-975A246

IN THE

Supreme Court of the United States

JULY TERM, 1978

No. 78-122

MICHAEL SHULER,
Petitioner,
v.
STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THEODORE L. SENDAK
Attorney General of Indiana

ROLLIN E. THOMPSON
Assistant Attorney General

Of Counsel: ROBERT J. BLACK
Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-4427
Attorneys for Respondent

C. E. Pauley & Co., Inc., Indianapolis

TABLE OF CONTENTS

Page

Questions Presented 1

Statement of the Case 1

Argument

I 2

II 3

Conclusion 4

TABLE OF AUTHORITIES

Cases:	*Page*
Dull v. State, (1978) — Ind. —, 372 N.E.2d 171	2
Grzesiowski v. State, (1976) — Ind. App. —, 343 N.E. 2d 305	3
Kerns v. State, (1976) — Ind. —, 349 N.E.2d 701	2
North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 707 (1969)	3
U.S. ex rel. Williams v. Twomey, (7th Cir., 1975) 510 F.2d 634	2

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Whether Petitioner's Sixth Amendment rights were violated by ineffective assistance of counsel at trial.

2. Whether the sentencing procedure at trial violated Petitioner's due process rights.

STATEMENT OF THE CASE

On December 3, 1973, Frederick Alter and Virgil Chesseldine were driving on an interstate highway in Indianapolis, Indiana. The Petitioner approached the victim's car

from behind at a high speed, tailgated it for a time and then cut abruptly in front of the victim's car. Alter motioned for the Petitioner to pull over. After both cars stopped, the drivers got out. The Petitioner had a gun in his hand and shot Alter as he approached.

The Petitioner was charged with Assault and Battery with Intent to Kill. He was convicted by a jury of Assault and Battery. The Indiana Court of Appeals affirmed the verdict unanimously and the Indiana Supreme Court denied Petitioner's Petition to Transfer. This Petition for Writ of Certiorari follows.

ARGUMENT

I.

In Indiana there is a strong presumption that trial counsel was competent. What the attorney did or did not do at trial must have made the proceedings a "mockery of justice shocking to the conscience of the reviewing Court." *Dull v. State,* (1978) —— Ind. ——, 372 N.E.2d 171; Kerns v. State, (1976) —— Ind. ——, 349 N.E.2d 701. Indiana's standard is very similar to the Seventh Circuit's "sham or mockery" standard. *U.S. ex rel. Williams v. Twomey,* (7th Cir., 1975) 510 F.2d 634.

The Petitioner argues that he was denied effective assistance of counsel in that his trial attorney did not object to the admission into evidence of his statement to police or evidence lawfully seized by police at the time of Petitioner's arrest. At trial the police officer to whom Petitioner made his statement testified that he gave Petitioner the *Miranda* Warnings and that Petitioner understood them. Thus, an objection by Petitioner's counsel would have been futile here anyway. As for the evidence seized by police at the time of Petitioner's arrest, Petitioner fails to demonstrate how such seizure was unlawful. The

facts do not indicate any illegality. Petitioner has failed therefore to overcome the strong presumption that his trial counsel was competent.

II.

After Petitioner was found guilty of Assault and Battery, sentencing was held before James A. Neel, Special Judge. Judge Neel offered the Petitioner a choice of sentences: either six months at the State Farm, or ten weekends in jail and a year's probation. The conditions of probation stipulated that the Petitioner not carry a gun for a year. From the record it is somewhat unclear if the Petitioner completely understood the terms of the probation, but he elected to take the jury's determination of six months at the State Farm.

Petitioner attempts to characterize the Special Judge's offer of probation as a denial of the right of appeal by claiming that the offer implies that the Petitioner could not appeal his conviction if he chose the reduced offer. This is a strained interpretation of the Special Judge's offer. It appears from the record that the Petitioner took the six months at the State Farm because he felt that to accept the probation would amount, in his own mind, to a confession of guilt.

In Indiana trial courts have the discretion to grant or deny a suspended sentence or probation. *Grzesiowski v. State,* (1976) —— Ind. App. ——, 343 N.E.2d 305. In the case at bar the Special Judge set the conditions of probation but the waiver of right of appeal was not one of them. Petitioner did appeal his conviction. If the State of Indiana had attempted to impose such a condition then Petitioner's attempt to bring his case under the mantle of *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed2d 707, (1969), might be persuasive. However, Petitioner cannot demonstrate the denial of a fundamental right.

CONCLUSION

WHEREFORE, Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

ROLLIN E. THOMPSON
Assistant Attorney General

ROBERT J. BLACK
Deputy Attorney General